

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL KOBYLSKI,	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 99-5568
v.	:	
	:	
INTERNAL REVENUE SERVICE	:	
and OFFICE OF TAXPAYER	:	
ADVOCATE R7214,	:	
Defendants.	:	
	:	

MEMORANDUM

Padova, J.

February , 2001

Plaintiff, acting pro se, filed a Complaint alleging that the Taxpayer Advocate office “is lacking the action needed to solve our problems with the Internal Revenue Service” and asking that “all 1040 and 941 assessments be re-opened and reviewed.” Before the Court are Defendants’ Motion to Dismiss and Plaintiff’s Motion for Collection of Damages. As stated below, the Court grants Defendants’ Motion and denies Plaintiff’s Motion.

I. Motion to Dismiss

Defendants move to dismiss on three grounds: (1) lack of jurisdiction over the United States pursuant to Federal Rule of Civil Procedure 12(b)(2); (2) insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5); and (3) lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

A. Lack of jurisdiction over the United States and insufficient service of process

The procedure for service of process upon the United States is set forth in Federal Rule of Civil Procedure 4(i):

- (1) Service upon the United States shall be effected (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought . . . or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia.
- (2) Service upon an officer, agency, or corporation of the United States, shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency or corporation.

Fed. R. Civ. P. 4(i).

Plaintiff filed a Certificate of Service on July 10, 2000, attached to a copy of the summons. The Certificate stated: “The same has been mailed United States postage first class to the following: (1) Honorable Janet Reno . . . (2) Michael Stiles U.S. Attorney.” By the face of his Certificate, Plaintiff has failed to effect proper service on the United States. Plaintiff used first-class mail, not registered or certified mail. Furthermore, Plaintiff directed his mailing to United States Attorney Stiles rather than to the civil process clerk at the office of the United States attorney. Defendants assert by Declaration of Darren D. Farfante, defense counsel in this matter, that the Office of the United States Attorney for the Eastern District of Pennsylvania informed Farfante that Plaintiff had not served a copy of the summons and Complaint on that office. (Decl. of Darren Farfante attached to Def. Mot. to Dismiss). Furthermore, Defendants assert that Farfante informed Plaintiff by letter of March 23, 2000, that he had failed to make proper service, and specified the defects. On June 1, 2000, the Court dismissed this action without prejudice for lack of timely service pursuant to Federal

Rule of Civil Procedure 4(m). On June 26, 2000, the Court granted Plaintiff's Motion to reinstate the case and ordered Plaintiff to make proper service of the Complaint within thirty (30) days or suffer dismissal of the case. Plaintiff's Certificate, described above, followed. Plaintiff has failed to effect service upon the United States in accordance with Federal Rule of Civil Procedure 4(i); therefore, Defendant's Motion to Dismiss is granted pursuant to Federal Rule of Civil Procedure 12(b)(5) and 12(b)(2).

B. Lack of subject matter jurisdiction

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (quoting FDIC v Meyer, 510 U.S. 471, 475 (1994)). Plaintiff's Complaint does not specify under what waiver of immunity he brings this action. Congress has consented to certain tax refund suits in 28 U.S.C. § 1346(a). United States v. Williams, 514 U.S. 527, 530 (1995). That statute provides:

The district courts shall have original jurisdiction . . . of . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

28 U.S.C.A. § 1346(a)(1) (West 1993). Furthermore, the Taxpayer Bill of Rights provides a cause of action against the United States in the district courts where, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the IRS recklessly, intentionally or negligently disregards any provision of the Internal Revenue Code or regulations. 26 U.S.C.A. § 7433(a) (West Supp. 2000).

Plaintiff's Complaint is largely incoherent. It appears to make two claims: (1) It seeks a review of "all 1040 and 941 assessments"; and (2) it alleges that the Taxpayer Advocate office has

failed to take action responsive to Plaintiff's complaints. In neither case does the Court have subject matter jurisdiction over Plaintiff's claims.

As for the first claim, the Complaint asks that "all 1040 and 941 assessments be re-opened and reviewed." The relief Plaintiff seeks -- an unbounded inquiry into tax assessments qualified neither by tax year nor alleged error -- is far broader than that provided in the discrete waiver of sovereign immunity that Congress created in Section 1346(a)(1). Plaintiff's claim is not cognizable under Section 1346(a)(1).

Moreover, subject matter jurisdiction under Section 1346(a)(1) is lacking because Plaintiff has not alleged that he has fully paid the tax assessments owing for the years 1981 through 1986. "It has been the uniform rule that a taxpayer must pay the full amount of a tax assessment or penalty before he can challenge its validity in a civil action in the United States district court under 28 U.S.C. § 1346." Psaty v. United States, 442 F.2d 1154, 1158 (3d Cir. 1971) (citing Flora v. United States, 362 U.S. 145, 80 S. Ct. 630 (1960)); Lampenfield v. Internal Revenue Service, 701 F. Supp. 90, 91 (M.D. Pa. 1988). Defendants point to "literal transcripts from the Internal Revenue Service of the unpaid federal tax assessments" against Plaintiff to assert that Plaintiff has failed to make full payment of assessments for those years, as is necessary to a claim under 28 U.S.C. § 1346(a)(1). Plaintiff has failed to respond by alleging that he has paid in full all assessments of which he seeks review. Therefore, the Court can find no basis for subject matter jurisdiction over Plaintiff's first claim under Section 1346(a)(1).

The Complaint's second claim, alleging omissions by the Taxpayer Advocate office, fails to bring a claim cognizable under 26 U.S.C. § 7433(a). That section provides a remedy for misconduct occurring "in connection with any collection of Federal tax." Plaintiff has not alleged that the

claimed omissions of the officers or employees of the Taxpayer Advocate office occurred during the course of any collection of Federal tax. Therefore, the Court lacks subject matter jurisdiction over Plaintiff's second claim under 26 U.S.C. § 7433(a).

For these reasons, the Court dismisses this action for lack of jurisdiction over the subject matter pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. Plaintiff's Motion for Collection of Damages

Plaintiff has filed documents titled "Motion for Collection of Damages (Doc. No. 8), "Amendment" (Doc. No. 10), and "Amend" (Doc. No. 11). Each of these documents makes allegations that are for the most part incoherent. The Court is unable to discern in them any cognizable cause of action or any argument overcoming the jurisdictional defects of the Complaint.

An action alleging unauthorized collection action by an officer or employee of the Internal Revenue Service pursuant to 26 U.S.C. § 7433(a) must be brought within two years after the date the right of action accrues. 26 U.S.C.A. § 7433(d)(3) (West Supp. 2000). Similarly, an action for civil damages for unauthorized inspection or disclosure of returns and return information must be brought within two years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure. 26 U.S.C.A. § 7431(d). The Court cannot discern in Plaintiff's filings any allegation referring to conduct in connection with the collection of any Federal tax occurring within two years before the filing of the Complaint. Plaintiff's document titled, "Amend" alleges a "leakage of confidential information regarding tax information from the Collection office" occurring "prior to the conflict in 1991," and makes no allegation that Plaintiff has discovered the leakage within the past two years. Plaintiff's filings subsequent to the Complaint fail to allege any cognizable basis for relief. Furthermore, they fail to overcome the jurisdictional defects of the Complaint. Therefore,

Plaintiff's Motion for Collection of Damages is denied.

III. Conclusion

Plaintiff has failed to serve the Complaint upon Defendants in compliance with Federal Rule of Civil Procedure 4(i). Plaintiff has failed to bring a claim cognizable under federal statutes waiving the sovereign immunity of the United States, and the Court therefore lacks subject matter jurisdiction. For these reasons, this action is dismissed. An appropriate order follows.